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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

ADELAIDE M. HARDING,
Plaintiff in Error,
vs.
GEORGE F. HARDING,
Defendant in Error.

Error to
Supreme Court
of California.

Brief and Argument for Plaintiff in Error.

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PLINY B. SMITH,
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CHAMPLIN LAW PRINTING CO.

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STATEMENT.

This proceeding is a writ of error to review the judgment of the Supreme Court of California, which affirmed a decree of the Superior Court of San Diego County, entered in January, 1901, granting the defendant in error a divorce *a vinculo* from plaintiff in error (Print. Trans., pp. 1-2, 23). The writ of error is based on the ground that the California court did not give full faith and credit to a prior decree, records and judicial proceedings of the State of Illinois, as required by section 1 of article 4 of the Constitution of the United States and by section 905 of the Revised Statutes thereof.

The Supreme Court of California refused to give due credit and effect to the decree, records and judicial pro-

ceedings of Illinois on the ground (which we shall show is an erroneous one) that the Illinois decree was a consent decree, and that, by the law or usage in the courts of Illinois, such a decree was not to be considered or given effect as a *judicium* or *res judicata*.

The State of California was not, at the time of the commencement of the suit, and never had been, the matrimonial domicile of the parties.

Furthermore, prior to the commencement of the divorce suit in California, the issue involved in the case had been tried in the Circuit Court of Cook County, Illinois, and adjudicated in favor of plaintiff in error by decree entered in that court in a suit between them commenced when defendant in error was admittedly a citizen of, and both parties were domiciled in, the State of Illinois. The case will be more clearly stated if we briefly show the proceedings chronologically.

The case and decree in Illinois:

On the 3d day of February, 1890, the plaintiff in error, Adelaide M. Harding, filed her bill in the Circuit Court of Cook County, Illinois, against defendant in error, George F. Harding, alleging that she was married to him in Peoria, Illinois, on November 7, 1855; that in 1862 they removed to Chicago, where they had since resided and were then residing. The bill charged that in 1888 the defendant, her husband, began toward her a systematic course of unkind and abusive and cruel treatment, which continued until *February 3, 1890*, when, in consequence of such treatment, and after exhausting all means of reconciliation, she left defendant's house, and had ever since lived and was then living separate and apart from him without fault on her part. The bill prayed that upon the final hearing it might be found and decreed that complainant was living separate and

apart from her said husband without fault on her part, and that defendant be decreed to provide her with support and maintenance during the time she had so lived, or might continue to live, separate and apart from him in such manner as might be just and reasonable, and that custody of their two minor daughters be awarded to her (Print. Trans., pp. 44-52).

In an amendment filed May 2, 1900, the complainant amended her bill by also charging the defendant with adultery. The defendant, George F. Harding, appeared and answered the bill and amended bill with great detail, admitting their marriage and their residence in Chicago, Illinois, since 1862, and specifically stating:

> "Your defendant, further answering, says, that he denies that the said complainant left his house because unable to endure the privations and cruelties described, and after exhausting all efforts at reconciliation." (Trans., p. 56.) * * *
>
> "Defendant, further answering, says that the complainant has left the home of the defendant, and is now living separate and apart from him, without excuse therefor, and wholly of her own fault, and without the fault of defendant; and defendant upon learning of such *abandonment and desertion* by complainant, immediately sent repeated and urgent invitations to complainant to return to his house." (Trans., p. 67.)

Thus the issue was clearly and sharply presented whether the separation of the parties on February 1, 1890, and the wife's living separate and apart from her husband was without her fault, or whether she had wilfully and without just cause deserted and abandoned him.

The suit of Mrs. Harding was brought under a statute of Illinois then in force, as follows:

"Sec. 1. *Be it enacted by the people of the State of Illinois represented in the General Assembly:* That married women who, without their fault, now live, or hereafter may live, separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their said husbands, for a reasonable support and maintenance, while they so live, or have so lived separate and apart; and in determining the amount to be allowed, the court shall have reference to the condition of the parties in life, and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit, as in cases of divorce.

"Sec. 2. Proceedings under this act may be instituted in the county where either the husband or wife resides, and the wife shall not be required to give security for costs in any such proceeding."

Much testimony was taken in the suit in different parts of the United States and abroad, and such proceedings were had that on July 26, 1897, a final decree was entered finding that the complainant, Adelaide M. Harding, at the time of the commencement of the suit (February 3, 1890) was living, and ever since had lived, and was then (at the entry of the decree) living separate and apart from her husband without her fault, and that the equities were with the complainant, and therefore ordering and decreeing that the defendant pay to the complainant $6,400 per year, and certain other allowances (Print. Trans., pp. 81–83). To this decree and every finding and every portion thereof, severally, defendant, Harding, objected and excepted, and he prosecuted an appeal therefrom to the Appellate Court of Illinois, where the decree was affirmed in all respects by that court (*Harding* vs. *Harding*, 79 Ill. App., 590); and on his further appeal from the Appellate Court

to the Supreme Court of Illinois, the decree was affirmed in all respects by the latter court, except as to the amount of alimony which was reduced to $3,600 per year (Print. Trans., pp. 73–74, 84; *Harding* vs. *Harding*, 180 Ill., 481).

It will thus be seen that the issue in the Illinois suit was whether the separation of the parties in February, 1890, and Mrs. Harding's thereafter living separate and apart from her husband, was without fault upon her part, and that question was adjudicated in her favor. If she was at fault and left her husband without cause, in other words, had she, disregarding the solemnity of her marriage vow, wilfully and without just cause, deserted and abandoned her husband, and since continued so wilfully and without just cause, to desert and abandon him and to live separate and apart from him without any sufficient cause or reason, and against his will and without his consent—which was the alleged cause of action in his California suit for decree—she could not have recovered her decree in Illinois. The following from the transcript of record in the Illinois case bears upon the question upon which the divorce suit in California turned in the Supreme Court of that state, viz., whether the Illinois decree was a consent decree.

On January 3, 1893, after the Illinois suit had been pending for nearly three years and a large amount of evidence of Harding's *delictum* therein alleged had been taken, consisting of the depositions of some twenty-eight or more witnesses, the defendant, Harding, filed in said cause, of his own motion and without Mrs. Harding's knowledge, a statement and admission (which he designated a "stipulation") in which, among other things, he stated:

> "I give my consent that a decree of separate maintenance shall be entered in favor of the plaintiff without a finding or trial of the issue in this cause.

That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand ready to make such other or further and different stipulation, by amendment of the pleadings or otherwise as may, in the opinion of your Honor, be required to make it unnecessary for the court to hear and decide upon the issue and evidence in this cause after a long and expensive hearing."

"To this end I declare my willingness to stipulate and I do hereby stipulate that the plaintiff, at the time of the commencement of this suit was living, and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance." (Print. Trans., 72.)

Thereafter on May 10, 1893, the cause came on to be heard upon a motion to set the case down for hearing and to hear the same, whereupon the court ordered that the case be referred to a master in chancery to take evidence and report the same with his conclusions upon the issue and question as to the amount or amounts to be allowed to complainant and to be decreed to be paid by defendant to her for alimony, support or otherwise, and upon the other issues than the question as to whether complainant at the time of the commencement of the suit was and since that time had been and then was living separate and apart from her husband without her fault—the order of reference reciting: "said defendant having admitted upon the record herein and now admitting in open court that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault." (Printed transcript p. 78.)

Nearly three years later, and after the evidence before the master had been completed, a further adversary order was entered by the court, *nunc pro tunc* as of May 10, 1893, by which said order of reference was modified, or re-entered *nunc pro tunc* as aforesaid, with the recital above quoted made to read as follows:

> "Said defendant having admitted upon the record herein, as by his written stipulation filed herein on January 3rd, 1893, and for the purpose of this trial only, that the complainant was at the time of the commencement of this suit and since that time has been and is living separate and apart from her said husband without her fault". (*Id.* p. 79.)

The order of reference provided that upon the hearing before the master, all competent evidence theretofore taken in the case might be read and other competent evidence might be introduced by either party, (Id. p. 78-79). The evidence which had been already taken at the time of the reference, and a large amount of additional evidence, was received by the master, who filed his report on September 22, 1896, and the cause came on for final hearing at the September and October term, 1896, of the court and was taken under advisement and while so under advisement came on for further hearing upon certain petitions then pending therein, at the January term 1897, and further received by the court, and the cause was again taken and held under advisement until the entry of the final decree on July 26, 1897. That decree, which was entered at the July term, 1897, recited as follows:

> "This cause having heretofore, at the September and October term 1896 of this court, come on to be heard upon the bill of complaint as amended herein, the answer as amended of the defendant thereto, the replication of the complainant to such answer and the pe-

tition and application of complainant for the custody of the children, and upon the report of Horatio L. Wait, master in chancery of this court, filed herein on the 22nd day of September, 1896, under and in pursuance of the order of reference to him theretofore entered therein, and upon the evidence referred to in the report of said master and upon which the said hearing before him on said reference was had; and the court having at the close of the said hearing taken said cause under advisement; and this cause also having come on to be heard at the January term, 1897, of this honorable court, and said cause being under advisement as aforesaid, upon the objections and application of the complainant and against the defendant for expenses of prosecuting her suit, and upon the petition of the defendant theretofore, on January 22nd, 1897, filed herein, and the complainant's answer thereto filed February 4th, 1897, and upon the proofs and evidence taken and heard in open court upon said hearing last mentioned; and the court having heard the argument of counsel and having thereupon taken the said cause under advisement." (*Id.* p. 81.)

By the decree, the court "having considered and being duly advised in the premises," thereupon found "that the said complainant at the time of the commencement of this suit was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault and that the equities of this cause are with the complainant" (*Ibid*). The decree further found, ordered, adjudged and decreed that the complainant was entitled to an allowance from defendant for her support while they had so lived separate and apart and while they should so live separate and apart, and decreed the sum of $6,400 from the date of the entry of the decree, to be without prejudice to the previous order of July 1,

1890, allowing $300 per month during the pendency of the suit, with certain other allowances; and also found and decreed that the complainant should have the custody of the two minor daughters (*Id.* 82); and the decree further recites as follows, and this clearly disposes of the contention that that decree was a consent decree:

> "And the said defendant objects and excepts to the foregoing decree, and to every finding and every portion thereof, severally, and prays an appeal therefrom to the Appellate Court in and for the First District of Illinois, which appeal is hereby allowed" (*Id.* 83).

The parties were allowed sixty days from the date of entry of the decree within which to present a certificate of the evidence and proceedings during or subsequent to the January term, 1897—the previous evidence heard before the master on the reference (which included the evidence theretofore taken in the cause and the evidence taken before the master), being already in the record as a portion of the master's report (*Id.* 81-83). Such certificate of evidence was presented, settled and signed September 24, 1897, at the September term of the court (*Id.* 91-92). This certificate recited that the defendant at the time of the entry of the decree excepted to all and to each and every part thereof (*Id.* 91). The certificate also recited as follows:

> "In settling the terms of said decree, the attorney for the complainant requested the court to find in such decree that the allegations of the said bill of complaint as amended herein are true, but the defendant objected to such finding on the ground of the paper filed herein on January 3, 1893, and presented to the court by the defendant, and the contents thereof, and on the further ground that such finding was not warranted by the proof; and the court stated that it, the court, had

not considered or passed on that question, for it, the court, regarded it as unnecessary, in view of the said paper of defendant, filed herein January 3, 1893; and thereupon such finding was not inserted in said decree." (*Id.* 91-92.)

In Harding's own testimony in the California case he says as to his filing the admission in the Illinois case:

"The testimony abruptly stopped with my stipulation of January, 1893, and after that we ceased to desire testimony on the object of adultery, and that the charges of cruelty were unnecessary—testimony upon that was unneccessary, but put in some and some as to other matters, bearing on—whatever it might be, tickets, furniture, but not immediately though, but that was for greater caution, lest we might be examined—the other side, we expected them to put in proof upon all the issues which had—that were at issue and that were sustained by the Supreme Court. In making my explanation I have been referring to the suit for maintenance brought in Illinois in February, 1890" (Print. Trans. 94-95).

And again, (referring to the deposition of Mrs. Louis, his co-respondent in the Illinois case,) he says:

"Q. Was her deposition ever taken for use in the Illinois case, or in this case, and was her testimony ever used in either? A. No, We never got to the taking of our testimony in that case except the testimony of Mrs. Louis—we never get any further on the question of adultery. We got through with Mrs. Louis' testimony. We took hers.

"Q. At about this stage then, when the testimony on this adultery issue had been produced from the other side you made this statement which has been introduced in evidence here as a part of the record in

the Illinois case? A. No, it was January 3rd, 1893, and their testimony had been taken in 1890 and early in 1891, I think. There was a lapse of a year or two in the taking of testimony; and a stipulation was made and we found it unimportant to take it, just as the stipulation states. I stand by that stipulation."

The California divorce case here in question.

On August 31, 1897, one month after the decree in the Illinois court above referred to in favor of plaintiff in error, the defendant in error, George F. Harding, filed in the Superior court of San Diego County, California, his complaint in the suit here at bar against his wife, the plaintiff in error, alleging that he had been a resident of California for a period of over one year, and of the county of San Diego over three months immediately preceding the commencement of his action; that *on or about the month of February, 1890*, the defendant, Adelaide M. Harding, disregarding the solemnity of her marriage vow, wilfully and without just cause deserted and abandoned the plaintiff, and ever since had and still continued so to wilfully and without just cause desert and abandon the plaintiff and to *live separate and apart from him without any sufficient cause or reason* and against his will, and without his consent, and demanding judgment that the bonds of matrimony existing between them be dissolved. (Print. Trans. 1-2.)

It will thus be seen that the issue presented by the plaintiff in that suit—the defendant in error here—was the identical issue previously presented by the bill filed by Mrs. Harding in the Circuit Court of Cook County, Illinois, and which had been adjudicated by that court.

The pretended desertion and abondment alleged in Harding's bill for divorce was the same withdrawal by her from his house and thereafter living separate and apart from her

husband, which was set up by Mrs. Harding in her bill in the Illinois court, and therein found and adjudged to be without her fault.

The evidence in the case, which will be referred to later, still further identifies the issues in the two cases.

Mrs. Harding appeared by counsel in the Superior Court of San Diego County, California, and on June 22, 1900, filed her answer denying that the defendant in error was or ever had been a resident of California; and denying that she had at any time wilfully and without just cause deserted him. Her answer set up the statute of Illinois above mentioned and the proceedings and decree in her suit against her husband in the Circuit court of Cook County, Illinois, and alleged that court to be a court of general jurisdiction.

Her answer also set up that in said Illinois suit defendant Harding by his statement in writing by him filed therein solemnly admitted of record that the plaintiff therein, Adelaide M. Harding, at the time of the commencement of that suit was living and ever since had been living apart from her husband without her fault; and her answer alleged that the said living by Mrs. Harding separate and apart from her husband mentioned in said statement of George F. Harding, was the same identical living separate and apart from him referred to his complaint for divorce; and that the separation and leaving by Mrs. Harding of George F. Harding mentioned in her bill in the Circuit Court of Cook County, Illinois, was the same separation and leaving of him and the same living separate and apart from him which was mentioned and referred to by George F. Harding in his complaint in the Superior Court of San Diego county. Her answer pleaded his said admission of record in the Illinois court and the final decree of that court in bar of the suit in California. (Print Trans. pp. 2-19.)

By a supplemental answer Mrs. Harding set up the proceedings on Harding's appeals, the affirmance in the Appellate Court and the proceedings and judgment of June 17, 1899, in the Supreme Court of Illinois on Harding's appeal from the final decree of July 27, 1897, of the Circuit Court, and the further decree of the Circuit Court of Cook County entered on the mandate of the Supreme Court modifying the former decree with respect to the amount of the allowance to Mrs. Harding. Her supplemental answer pleaded and set up said final decree as so modified as a bar to and estoppel in his California suit (*Id.*, 19-22). No reply was filed by plaintiff, Harding, to Mrs. Harding's answer, but the divorce came on to be heard January 14, 1901, upon the complaint and upon her answer and supplemental answer, and upon the evidence introduced.

A transcript of the record of the Illinois suit and decree exemplified as provided by the act of congress, was introduced in evidence on Mrs. Harding's part, upon the hearing of the California suit (Print. Trans., pp. 44-86).

It has already been stated that an examination of Mr. Harding's complaint in the California court, and Mrs. Harding's bill in the Illinois court shows that the issues in the in the two suits were identical. This is rendered still more obvious by the stipulation as to evidence filed in the California court and by the evidence itself. The stipulation provides:

> "That during the trial hereof, any portion of the testimony of the witnesses in the case of *Adelaide M. Harding* vs. *George F. Harding*, begun in the Circuit Court of Cook County in the State of Illinois, as such testimony is set forth in the printed abstract of the record for appeal by the said George F. Harding in the Appellate and Supreme Courts of said state may be read in evidence as fully and with the same effect as though

the witnesses whose testimony is read, were present in this court."

And that

"Either party has the right under this stipulation to introduce any portion of said printed abstract" (Trans., p. 37).

That such testimony of witnesses who testified in the case of Mrs Harding against her husband in the Illinois case was under this stipulation, used in the California case is shown by the printed record. Reference to the record shows that the testimony of thirty-seven witnesses who testified in the Illinois case was read on the hearing in the case in California (Trans., pp. 38-9, 86-90). For brevity, the testimony of the witnesses is not printed, as it is conceived it has no bearing on this case, but the fact of their testimony having been used in the California case is cited as showing, with the stipulation under which it was used, the absolute identity of the issues in the two cases; so that not only the pleadings, the stipulation and the evidence introduced thereunder show, not only that the same issue was involved in the two cases, but that they were tried largely on the same evidence.

Harding did not allege in his bill of complaint nor did he pretend to present any proof that Mrs Harding had ever resided or been in the State of California. The parties were married in Peoria, Illinois, and resided there for some years and then removed to Chicago, where they lived together until early in 1890, and it is to be presumed (as the fact is) that Mrs. Harding has continued to reside there ever since. Such presumption is made imperative by the California Civil Code of Procedure, Sec. 1963 Par. 32, which provides that presumptions if uncontradicted shall prevail: "That a thing once proved to exist continues as

long as is usual with things of that nature." Harding's proof to sustain the allegation in his bill of his own residence in California was scant and suspicious (Print, Trans, 25-36, 40-43, 90-91, 94.) But Mrs Harding's residence remained in Illinois: *and that has always* been the matrimonial domicile.

At the conclusion of the divorce trial, the Superior Court of San Diego County entered its findings of fact: (1) That the parties were married at Peoria, Illinois in November 1855, and cohabitated as husband and wife until about February 1, 1890: (2) that plaintiff, George F. Harding, had been a *bona fide* resident of California for more than one year before the commencement of the suit, and of said county for more than three months; (3) that on or about the first day of February 1890, the defendant (Mrs. Harding) did wilfully and without just cause desert and abandon the plaintiff and ever since then had and so continued to wilfully and without just cause desert and abandon the plaintiff, and to live separate and apart from him without any sufficient cause or reason; (4) that all the allegations in the complaint were true, and that all the allegations contained in the answer in conflict with the allegations in the complaint were untrue; (5) that the Circuit Court of Cook County, Illinois, a court of competent jurisdiction, had entered decrees for allowances of alimony in favor of the defendant, which were adjudged by the Supreme Court of Illinois to be equal to the then present ability the estate of the husband." (Trans. pp. 22-23).

As conclusions of law, the court found: (1) That the plaintiff was entitled to a decree dissolving the bonds of matrimony between the parties; and (2) "That this court in this case has no jurisdiction to limit or in any way affect the decree of the Circuit Court of Cook County, State of

Illinois, adjudging a separate maintenance to the defendant." (*Id.* 23-24). Thereon, the marriage between the parties was decreed to be dissolved.

It thus appears that the Superior Court of San Diego County, California, tried the identical issue already adjudicated by the Circuit Court of Cook County, Illinois, upon the same evidence heard in the latter court, and disregarding the decree of that court and failing to give it force and credit as required by the Federal Constitution, rendered a decree finding directly opposite to the findings of the decree of the Illinois court.

The plaintiff in error thereupon appealed to the Supreme Court of California, which court affirmed the judgment of the Superior Court of San Diego County, and this writ of error is sued out to review that judgment of affirmance.

As appears by its opinion the California Supreme Court declared itself concluded on questions of fact where there was conflicting evidence, and so could not disturb the determination of the court below on the question of the *bona fides* of plaintiff's residence or the sufficiency of evidence (Trans., p. 108). The court further stated:

> "It is earnestly insisted, however, that the question of defendant's alleged desertion was not open to inquiry but that its consideration had been foreclosed by a judgment of the Illinois court, which judgment operated as an estoppel." (Trans., p. 108.)

The court then proceeded to deal with the question as to the faith and credit to which the Illinois decree was entitled. It first held from the record of the Illinois case, that the decree was a consent judgment, and then disposed of the question as follows:

> "It is fundamental that no more force is to be allowed to the judgment of a sister state, when raised

as a bar by way of estoppel in an action between the parties in another state, than would be accorded to that judgment by the courts of the state which rendered it, or as Mr. Freeman puts it, 'The first question to be determined in regard to a judgment of another state after jurisdictional inquiries have been satisfactorily answered is, what is its effect in the state whence it was taken? The effect it has there is precisely the effect which must be accorded to it in every other state' * * *. By the rule of decision in the courts of Illinois, adopting that of the English courts, a consent judgment operates to estop the parties no further than is necessary to secure the enforcement of the judgment or decree in the particular matter in which the consent judgment was given, and it is not a bar to any inquiry into the same question in any other action." (Print. Trans., pp. 109-10).

The court then considers the case of *Wadhams* vs. *Gay*, 73 Ill., 417, as so ruling, and continues:

"It thus appears, from this case, that the courts of "Illinois will not allow the application of the doctrine of "estoppel to a consent judgment, which merely regis- "ters the agreement between the parties," basing this upon the cases of *Wadhams* vs. *Gay*, *supra*, and *Farwell* vs. *Gt. Western Tel. Co.*, 160 Ill., 522, and further says:

"We are not here considering the doctrine of estoppel, as it may be applied to judgments by the courts of this state. Our consideration is limited to the determination of the rule as it obtains in the State of Illinois, for, as has been said, no higher efficacy can be given to it by the courts of this state, and it appears, for the reasons stated, that that judgment having been entered into by consent, would not in the courts of Illinois raise the bar of estoppel against the determi-

nation of the issue of desertion, which was tried and determined in this state adversely to the appellant.

"For the foregoing reasons the judgment and order appealed from are affirmed." (*Id.*, 110).

It thus appears that the Supreme Court of California considered and recognized the requirement of section 905 of the Revised Statutes of the United States, and of section one of article four of the Constitution. But, as we shall show, that court did not observe that requirement or give to the Illinois decree the credit and effect which it has by law and usage in the courts of Illinois as so required.

A consideration of these Illinois cases, as will appear later, shows that the Supreme Court of California entirely misapprehended the scope of these decisions.

A writ of error was sued out of this court upon the judgment of the Supreme Court of California. A *specification of the errors* assigned is as follows:

Specification of errors.

1. The Supreme Court of California erred in affirming and in not reversing the judgment or decree of the Superior Court of San Diego County, California, thereby contravening the rights of plaintiff in error under the constitution and laws of the United States (assignment of errors, pp. 1, 2, Trans., pp. 113, 114).

2. The Supreme Court of California erred in not holding and deciding that the Superior Court of San Diego County, California, erred in finding as a conclusion of the law that the plaintiff there (defendant in error here), was entitled to a decree dissolving the bonds of matrimony theretofore existing between the plaintiff and the defendant and decreeing them to be freed and absolutely released from the bonds of matrimony and all obligations thereof (*id.*, 114).

3. In not holding that the decree of the Circuit Court of Cook County in the State of Illinois was a bar to said suit and proceedings (*Ibid*).

4. In not holding that full faith and credit should be given to the decree and judicial proceedings of the Circuit Court of Cook County, Illinois, in the case formerly pending there between the plaintiff in error and defendant in error; and that full faith and credit being so given said decree would be a bar to said suit in the Superior Court of San Diego County and in the Supreme Court of California (*Ibid*).

5. The Supreme Court of California erred in not giving full faith and credit to the record and judicial proceedings of the State of Illinois, namely, the said decree and proceedings in the Circuit Court of Cook County, Illinois, in the suit between the plaintiff in error and the defendant in error; and in holding that the giving of faith and credit to the said decree of the Circuit Court of Cook County, Illinois, did not require that said decree be held to be an estoppel in said suit.

6. The Supreme Court of California erred in holding that said decree of the Circuit Court of Cook County, Illinois, was a consent judgment or decree; and in holding that the said decree of the Circuit Court of Cook County, Illinois, was not a bar to said suit brought in the Superior Court of San Diego County, California.

7. The Supreme Court of California erred in failing to give full or due faith and credit to the judgment of the Supreme Court of Illinois affirming the said decree of the Circuit Court of Cook County, Illinois.

There is thus drawn in question:

1. The authority exercised under the State of California to dissolve the marriage relation of this plaintiff in error,

a resident of Illinois, in disregard of a former decree of an Illinois court adjudging the same issue in her favor, on the ground of its being repugnant to section one of article four of the constitution, and to sections 905 and 906 of the revised statutes.

2. The right of plaintiff in error under said provisions of the constitution and act of congress to have the Illinois decree in her favor receive and have the same faith and credit given to them in the courts of California as they have in the courts of Illinois.

3. The jurisdiction of the subject-matter and power in the California courts in the divorce suit to dissolve the marriage between parties whose matrimonial domicile is in Illinois, for alleged causes occurring in Illinois, on the ground that the divorce proceedings in the California court do not constitute due process within the fourteenth amendment.

BRIEF.

I.

This court has jurisdiction to review the ruling in question of the Supreme Court of California upon this writ of error.

The following cases are conclusive on this question:

Andrews vs. *Andrews*, 188 U. S., 14.
Atherton vs. *Atherton*, 181 U. S., 155.
Bell vs. *Bell*, 181 U. S., 175.
Streitwolf vs. *Streitwolf*, 181 U. S., 179.
Lynde vs. *Lynde*, 181 U. S., 183.
Water Power Co. vs. *R. R. Co.*, 172 U. S., 475.
Central Natl. Bank vs. *Stevens*, 169 U. S., 432.
Huntington vs. *Attrill*, 146 U. S., 657.
Gt. Westn. Tel. Co. vs. *Purdy*, 162 U. S., 329.

In *Andrews* vs. *Andrews*, a writ of error to Massachusetts, on ground that faith and credit was not given to a South Dakota decree of divorce, the point was made that no federal question was presented. The report of the Massachusetts case shows no question under the federal constitution or laws specially set up, but this court held that rights under the federal constitution were in due time asserted, and the effect of the judgment was to deny those rights.

In the quotation from the opinion of the California Supreme Court, *supra*, the court recognized and considered

the federal question in recognizing the requirement that it should give to the Illinois decree the effect which that decree has in Illinois.

The federal question is then presented within the requirement of either clause of section 709, R. S.

This case comes within the second clause of section 709, because there is drawn in question the validity of an authority exercised by the Supreme Court of California, on the ground of its being repugnant to the constitution and laws of the United States.

It makes no difference by what department of the state the authority was exercised the validity of which is called in question.

R. R. vs. *Chicago*, 166 U. S., 226, 233-4.

It is thoroughly settled that in the cases under the second clause of secton 709, if the decision of the federal question was necessarily involved in the state court, and the case could not have been determined without deciding such question, this is sufficient.

Water Power Co. vs. *Street R. R. Co.*, 172 U. S., 475, 488, and cases cited.

Chapman vs. *Goodnow*, 123 U. S., 540.

However, as shown, it appears that the federal right had been by adequate specification called to the attention of the state court, had been by it considered, and that that question was necessarily involved in the determination of the cause within the requirement case under the third clause. It is settled that no particular form of words are necessary in which the claim of federal rights must be asserted. It is sufficient that it appears from the record that such rights were specially set up in such manner as to bring it to the attention of that court.

Green Bay, etc., Co. vs. *Patent Paper Co.*, 172 U. S., 58, 67-8.

It is enough that it appears from the record either that the right, so set up snd claimed, was expressly denied, or that such was the necessary effect of the judgment.

Roby vs. *Colehour*, 146 U. S., 153, 159.

If it appears from the record that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.

It is enough. where the validity of the the decreee of one state is brought before a court of another state, and the question there presented and involved and decided was as to the effect to be given to such former decree, and it is contended in this court that full faith and credit was not given as required by the federal constitution and law, to give this court jurisdiction.

Andrews vs. *Andrews*, 188 U. S., 14.
Atherton vs. *Atherton*, 181 U. S., 155.
Bell vs. *Bell*, *Id.*, 175.
Streitwolf vs. *Streitwolf*, *Id.*, 179.
Lynde vs. *Lynde*, *Id.*, 183.

Here the federal question was in fact the only question decided by the Supreme Court of California.

The following additional cases sustain the jurisdiction here:

Chicago L. I. Co. vs. *Needles*, 113 U. S., 574, 579.
Eureka Lake vs. *Yuba County*, 116 U. S., 410, 414.
Arrowsmith vs. *Harmoning*, 118 U. S., 195.
Kaukauna County vs. *Green Bay Etc. Co.*, 142 U. S., 257, 271.
Roby vs. *Colehour*, 146 U. S., 143, 159.

R. R. vs. *Adams*, 180 U. S., 28.
R. R. vs. *Osborn*, 193 U. S., 17, 28.
Laing vs. *Rigney*, 160 U. S., 531.

It is now settled that the opinion of the state court may be examined for the purpose of determining whether the federal question was presented and decided.

Water Power Co. vs. *Street Ry. Co.*, 172 U. S., 475-488-9.
Phil. Fire Assn. vs. *New York*, 119 U. S., 110, 116.

The narrower interpretation of the jurisdictional statute prevailing prior to the act of February 5, 1867 (which omitted the provision of the former act forbidding assignment of any errors except as should appear on the face of the record) is not applicable. This omission was a substantial one.

Stewart vs. *Kohn*, 11 Wall., 493, 502.
Murdock vs. *Memphis*, 20 Wall., 590, 633.

Again under the fourteenth amendment, proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Pennoyer vs. *Neff*, 95 U. S., 714, 733.

Jurisdiction of the subject-matter in actions of divorce depends upon domicile, "and without such domicile there was no authority to decree a divorce."

Andrews vs. *Andrews*, 188 U. S., 14, 39.

Citing and applying:

Atherton vs. *Atherton*, 181 U. S., 155.
Bell vs. *Bell*, *id.*, 175.
Streitwolf vs. *Streitwolf*, *Id.*, 179.

In *Bell* vs. *Bell*, *Stritwolf* vs. *Streitwolf*, and *Andrews* vs. *Andrews*, the question was expressly reserved whether jurisdiction to render a divorce, could be acquired by domicile in the state of the party plaintiff where there had been no matrimonial domicile in such state. (See 188 U. S., p. 40.)

That question is presented here with the additional circumstance that the California court refused to give due faith and credit to the Illinois decree.

II.

A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, can not be again drawn into question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

Black on Judges, Sec. 504.
Stockton vs. *Ford*, 18 How., 414.
Hopkins vs. *Lee*, 6 Wheat., 109.
Smith vs. *Kernochen*, 7 How., 198.
Young vs. *Black*, 7 Cranch, 565.
Gaines vs. *Miller*, 111 U. S., 395.
Eldred vs. *Bank*, 17 Wall., 575.
Marine Ins. Co. vs. *Young*, 1 Cranch, 332.
Thompson vs. *Roberts*, 24 How., 233.
Goodrich vs. *Chicago*, 5 Wall., 566.

And the rule is aptly stated in different words by the Supreme Court of Massachusetts:

"A cause of action once finally determined, without appeal, between the parties, on the merits, by a com-

petent tribunal, can not afterwards be litigated by a new proceeding either before the same or any other tribunal."

Foster vs. *The Richard Busteed*, 100 Mass., 412.

A final decree in chancery is as conclusive as a judgment at law.

Shriver vs. *Lynn*, 2 How., 43.
Washington Bridge Co. vs. *Stewart*, 3 How., 413.
Pennington vs. *Gibson*, 16 How., 65.
Nations vs. *Johnson*, 24 How., 195.
Bryan vs. *Bennett*, 113 U. S., 179.

What has been said in the opening statement shows that the issues in the California case and in the Illinois case were identical, and they were treated as identical by the California court.

Under stipulation the same testimony used in the Illinois suit was used in the suit in California. (Ptd. Tr., pp. 37–39, 86–90.)

The California court was bound by the Illinois decree yet proceeded to adjudicate the identical issue upon, in great part, the same identical evidence and entered an opposite judgment.

The fact that the two actions were different in form makes no difference as respects the faith and credit clause of the constitution.

III.

The California court was bound by the adjudication by the Illinois court, and, in disregarding the Illinois decree the California court deprived plaintiff in error of a right under the federal constitution and statutes.

Federal Constitution, Art. IV, Sec. 1.
U. S. Rev. Stat., Sec. 905.

The clause of the federal constitution and statute referred to applies to decrees of divorce.

Atherton vs. *Atherton*, 181 U. S., 155.

This court has construed these sections of the constitution and statute to mean that the court of a state must allow to a judgment of a sister state the same effect that it has in the state where rendered.

Mills vs. *Duryee*, 7 Cranch, 481.
Renaud vs. *Abbott*, 116 U. S., 277.

In *Mills* vs. *Duryee*, it was held that this provision changed the common-law effect of judgments of other states.

See, also:

Hilton vs. *Guyot*, 159 U. S., 113, 181.

While this court, on writ of error to the Supreme Court of a state, will not take judicial notice of the law of another state, yet where the court, whose decision is under review, does take judicial notice of the law of another state, this court will do the same.

Renaud vs. *Abbott*, 116 U. S., 277.
Hanley vs. *Donoghue*, 116 U. S., 1.

The Supreme Court of California, as appears by its opinion, assumed to take judicial notice of the law of the State of Illinois. This court, therefore, will take judicial notice of the law of Illinois, and inquire whether the California Supreme Court gave to the Illinois decree the force and effect which it has in Illinois.

It is contended that the Illinois decree was a consent decree; that the California court was bound to give it only the same effect given to it in Illinois; and that in Illinois a consent decree in *res judicata* and the Supreme Court of California so held, but this view is erroneous.

(1.) The Illinois decree was not a consent decree.

(2.) If it were, it would conclude the parties to the same extent as though it were admittedly a decree *in invitum*.

(3). The courts of Illinois did not hold that a consent decree is not an adjudication and does not conclude parties, but they hold the contrary.

While the Illinois court purported to give the Illinois decree the same effect it had in Illinois, yet if that court erred in applying the rule, the jurisdiction here of the writ of error holds.

M'Elmoyle vs. *Cohen*, 13 Pet., 312.
R. R. vs. *Wiggins*, 108 U. S., 18.
Huntington vs. *Attrill*, 146 U. S., 657.

(1.) *The Illinois decree is not a consent decree.*

(*a*.) The so-called "stipulation" filed by Harding, is not a stipulation—that is an agreement between the parties—it was an admission of record of a *fact* and was so treated by the court.

(*b.*) Reference must be had to the decree to determine its character; the decree shows that the case came on to be heard, not on the *consent* of the defendant that a decree might be entered, but upon the bill, answer, replication, master's report and proof (Ptd. Tr., 16).

It matters not that the finding may have been based on the admission of the defendant.

The recital in the certificate of evidence can not affect the decree. Nothing the court may say outside of the decree can change the effect of what the decree itself speaks.

Campbell vs. *Wilson*, 195 Ill., 284.

That it was not a consent deccee is also apparent from the recital of the decree that Harding objected and excepted to every finding and every portion thereof. (Ptd. Tr., 83 and 91).

It is further apparent from the opinion of the Supreme Court of Illinois (*Harding* vs. *Harding*, 180 Ill., 481). It there appears (pp. 497-8), that Harding assumed as error the finding Mrs. Harding "was at the time of the filing of the bill, living, and ever since had been living, separate and apart from appellant without her fault."

He, consequently, did not regard the decree as a consent decree, for a consent decree can not he appealed from,

Armstrong vs. *Cooper*, 11 Ill., 540.
Knobloch vs. *Mueller*, 123 Ill., 554.
R. R. vs. *U. S.*, 113 U. S., 261.

The Supreme Court of Illinois held in the Harding case (180 Ill., p. 503) that the so-called stipulation of Harding "amply justifies the finding of a decree of the court in so far as it related to her living separate and apart from appellant without her fault."

(2.) Even if the decree were a consent decree it would have the same binding effect as thongh it were a decree *in invitum.*

Knoblock vs *Mueller*, 123 Ill., 554, 565.
O'Connell vs. *Ry.*, 184 Ill., 308, 325.
Lagerquist vs. *Williams*, 74 Ill., App., 17.

A judgment upon a *cog novit* concludes the parties.

A judgment entered, where upon trial a party waives proof of, and formally admits a fact, is conclusive. A judgment rendered upon an admission of fact or by consent, is conclusive on the parties to the same extent as though rendered upon a contest.

Black on Judg's, Sec. 705.
Ry. vs *U. S.*, 113 U. S., 261.
Burgess vs. *Seligman*, 107 U. S., 20.
Thomson vs. *Wooster*, 114 U. S., 104.
Bank vs. *Higginbottom*, 9 Pet., 48.
U. S. vs. *Parker*, 120 U. S., 89.

The rule also applies to judgments by default.
Harshman vs. *Knox Co.*, 122 U. S., 306.

Also to judgment on demurrer.
Gould vs. *R. R.*, 91 U. S., 526.
Bissell vs. *Springvalley Twp.*, 124 U. S., 225.

(3.) Such also is the law of the state of Illinois.
O'Connell vs. *R. R.*, 184 Ill., 308.
Knobloch vs. *Mueller*, 123 Ill., 554.
Lagerquist vs. *Williams*, 74 Ill. App., 17.

The Supreme Court of California misconceived the Illinois decisions and rule.

That court cited the case of *Wadhams* vs. *Gay*, 73 Ill. 415 and *Farwell* vs. *Gt. West'n. Tel. Co.*, 161 Ill., 522, as

supporting the decision that a consent decree is not *res judicata*, but misconceived the scope and meaning of those decisions, as they recognize the contrary doctrine.

The case of *Wadhams* vs. *Gay*, was a bill filed to carry into effect a previous decree in partition. The Supreme Court of Illinois held only, that on such a bill it was proper to look into the decree, and if it were erroneous, to refuse to enforce it.

In that case it was argued that the decree was entered by consent, but the court held that the party never had consented to the decree.

In *Farwell* vs. *Gt. Wst'n. Tel. Co.*, parties claimed that a previous decree was *res judicata*. The court held that it had been entered by fraud and collusion and for that reason was not binding; that equity could set aside judgments and decrees obtained by fraud, citing *Johnson* vs. *Waters*, 111 U. S., 640, thus placing itself on the doctrine held by this court.

It is, however, not necessary to invoke the rule that under the circumstances this court may take judicial notice of the laws of Illinois.

The rule in California is, that in the absence of proof, the courts of California will presume that law to be the same as the law of California.

Shumway vs. *Leskey*, 67 Cal., 458.

The presumption is even extended to the statute law of California.

Cavallaro vs. *R. R.*, 110 Cal., 348.

Applying the rule of California, a judgment by stipulation is conclusive as to all matters within the issue.

McCreery vs. *Fuller*, 63 Cal., 30;
Partridge vs. *Shepard*, 71 Cal., 470.

It follows from either course of reasoning that the question at issue in the California suit had been adjudicated in the Illinois courts, and that the effect of such decree in Illinois was to make the adjudication everywhere conclusive upon the parties; that the California courts refused to give the Illinois decree the faith and credit which it had by law and usage in the courts of Illinois.

IV.

The State of California never was the matrimonial domicile of the parties, and therefore, the courts of California had no jurisdiction of their matrimonial tatus, and the ecree of the California court was consequently for this reason also, erroneous.

The record showed that Mrs. Harding had always, since her marriage, lived in Illinois.

There was no evidence showing, or tending to show, that California had ever been the matrimonial domicile of the parties.

The rule applies, that it is to be presumed her residence, the *status* and the matrimonial domicile remained in Illinois (Cal. Civil Code of Proc., Sec. 1693, Par. 32).

A suit for a divorce is a proceeding *in rem*. The status of the parties is the *res*. In a proceeding *in rem* the jurisdiction of the court over the *res* must affirmatively appear.

It appears from the record that the matrimonial status—the *res*—was created and established in Illinois, it not appearing that this *status* had ever been removed to California, the California courts had no jurisdiction of the suit. In a proceeding *in rem* the court will not presume that the *res* existed within the jurisdiction of the court, but it must be averred and proved.

This court has not, as yet, directly passed upon the point made in this division of the brief, but in several cases it has especially reserved the question.

Bell vs. *Bell*, 181 U. S., 175.
Streitwolf vs. *Streitwolf*, 181 U. S., 179.
Andrews vs. *Andrews*, 180 U. S., 14, 40.

ARGUMENT.

I.

This court has jurisdiction to review the ruling in question of the Supreme Court of California, upon this writ of error.

The following cases are conclusive on this question: *Andrews* vs. *Andrews*, 188 U. S., 14; *Atherton* vs. *Atherton*, 181 U. S., 155; *Bell* vs. *Bell*, 181 U. S., 175; *Streitwolf* vs. *Streitwolf*, 181 U. S., 179; *Lynde* vs. *Lynde*, 181 U. S., 183; *Water Power Co.* vs. *Railway Co.*, 172 U. S., 475; *Central Nat. Bank* vs. *Stevens*, 169 U. S., 432; *Huntington* vs. *Attrill*, 146 U. S., 657; *Gt. W. Tel. Co.* vs. *Purdy*, 162 U. S., 329.

In *Andrews* vs. *Andrews*, *supra*, which was a writ of error to review the judgment of the Supreme Judicial Court of Massachusetts, on the ground that full faith and credit was not given by that court to a decree of divorce rendered in South Dakota, which was held by the Massachusetts court to be void in that state. the point was made in this court that no Federal question was presented by the record, that while possibly a Federal question might have been raised in the courts of Massachusetts which would have supported the writ of error, it did not appear that

the courts of that Commonwealth were called upon to consider any Federal question, nor did they appear to have disposed of one; and that under such circumstances the writ of error should be dismissed. So far as the report of the Massachusetts case shows, no right, privilege or immunity under the constitution or laws of the United States was specially set up and claimed in that court. Indeed, counsel for plaintiff in error relied upon the contention that it was not necessary that the Federal question appear affirmatively upon the record or in the opinion, if the adjudication of such question is involved in the disposition of the case by the state court. But this court held that it was "unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights."

In this case, the opinion of the Supreme Court of California expressly shows that the Federal question, viz. the question as to the faith and credit required to be given to the Illinois decree and proceedings, was pressed upon that court by the plaintiff in error. It is said:

> "It is earnestly insisted, however, that the question of defendant's alleged desertion was not open to inquiry, but that its consideration had been forclosed by a judgment of the Illinois court, which judgment operated as an estoppel." (Print. Trans. 108).

As we have also shown from the quotation from that opinion in the statement of the case, *supra* (page—) the California case, recognized and considered the Federal question in recognizing the requirement that it should give to the Illinois decree the effect which that decree has in Illinois, and in then considering what the rule of decision in the courts of Illinois is, and in purporting to follow what it regarded as such rule of decision. (Print. Trans. 109-10).

The California court, in other words, must be held to have had in mind, in recognizing this requirement, the provision of the Federal constitution and statute, which is the law requiring that effect to be given. The Federal question is, then, presented, within the requirement of either of the clauses of section 709 of the Revised Statutes.

But we submit that this case comes within the second clause of cases provided for in section 709, because there is here drawn in question the validity of an authority exercised by the Supreme Court of California under that state, on the ground of its being repugnant to the Constitution and laws of the United States. The California court exercised an authority under that state in adjudging, in disregard of the binding and conclusive effect of the Illinois decree, that plaintiff in error, a non-resident of that state and a resident of Illinois, was guilty of wilful desertion and abandonment of her husband without just cause, and thereafter continuing, wilfully and without just cause, to desert and abandon and to live separate and apart from him, without any sufficient cause or reason and against his will and without his consent, and in dissolving the marriage relations between the parties whose matrimonial domicile was in Illinois, and one of whom (Mrs. Harding) resided in Illinois, and for an alleged desertion committed in Illinois. The validity of that authority, so exercised under the State of California, was there drawn in question, and is here drawn in question, on the ground of its being repugnant to section 1 of article 4 of the Constitution and section 905 of the Revised Statutes, and to the fourteenth amendment to the Constitution.

It makes no difference by what department of the state the authority was exercised the validity of which is drawn in question. (*Chicago, Burlington & Quincy R. R.* vs.

City of Chicago, 166 U. S., 226, 233-4.) But here the authority exercised by the Supreme Court of California, which is the final interpreter of its own laws, must be held to have been exercised under the laws of that state; and necessarily those laws, as well as the judgment of the court, must be held to be here drawn in question.

It is thoroughly settled that in cases under the second clause of section 709, if the decision of the federal question was necessarily involved in the case in the state court, and the case could not have been determined without deciding such question, this is sufficient. *Water Power Co.* vs. *Street Ry. Co.*, 172 U. S., 475, 488, and cases cited; *Chapman* vs. *Goodnow*, 123 U. S., 540.

However, we have above shown that it appears from the record that the federal right thus relied upon had been, by an adequate specification, called to the attention of the state court, and had been by it considered, and that that question was necessarily involved in the determination of the cause, within the requirement in cases under the third class. It is settled that no particular form of words or phrases have been declared necessary in which the claim of federal rights must be asserted. It is sufficient that it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court. *Green Bay Etc. Co.* vs. *Patent Paper Co.*, 172 U. S., 58, 67-68. It is enough that it appears from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment. *Roby* vs. *Colehour*, 146 U. S., 153, 159. If it appears from the record, by clear and necessary intendment that the federal question must have been directly involved, so that the state court could not have given judgment without

deciding it, that will be sufficient. But it is enough, that in every case, like this, where the validity of the decree of one state, like the Illinois decree here, is brought before a court of another state, and the question there presented and involved and decided, was as to the effect—the faith and credit—to be given to such former decree, and it is contended on writ of error to this court that full faith and credit was not given, as required by the Federal Constitution and law, this court has jurisdiction of the writ of error. *Andrews* vs. *Andrews*, 188 U. S., 14; *Atherton* vs. *Atherton*, 181 U. S., 155; *Bell* vs. *Bell*, Id., 175; *Streitwolf* vs. *Streitwolf*; Id., 179; *Lynde* vs. *Lynde*, Id., 183. Here the Federal question was in fact the only question decided by the Supreme Court of California.

The following additional cases clearly sustain the jurisdiction here: *Chicago Life. Ins. Co.* vs. *Needles*, 113 U. S., 574, 579; *Eureka Lake Co.* vs. *Yuba County*, 116 U. S., 410, 414; *Arrowsmith* vs. *Harmoning* 118 U. S., 194; *Kaukauna County* vs. *Green Bay etc. Co.* 142 U. S., 254, 271; *Roby* vs. *Colehour*, 146 U. S., 153, 159; *Illinois Central R. R.*, vs. *Adams*, 180 U. S., 28; *Grand Rapids, Etc. R. R.*, vs. *Osborn*, 193 U. S., 17, 28; *Laing* vs. *Rigney*, 160 U. S., 531.

It is now settled that the opinion of the state court may be examined for the purpose of determining whether the Federal question was presented and decided. *Water Power* v. *Street Ry. Co.*, 172 U. S., 475, 488-9; *Phila. Fire Association* vs. *New York*, 119 U. S., 110, 116. The narrower interpretation of the jurisdictional statute prevailing prior to the passage of the act of Feb. 5, 1867, (which omitted the provision of the former act forbidding the assignment of any errors except as should appear on the face of the record), is not applicable. This omission was a sub-

stantial one. *Stewart* vs. *Kahn*, 11 Wall., 493. 502; *Murdock* vs. *Memphis*, 20 Wall., 590, 633.

Again, it has been recognized that under the Fourteenth Amendment, proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. *Pennoyer* vs. *Neff*, 95 U. S., 714, 733.

Jurisdiction of the subject-matter in actions of divorce depends upon domicile. "And without such domicile there was no authority to decree a divorce." *Andrews* vs. *Andrews*, 188 U. S., 14, 39 citing and applying, *Atherton* vs. *Atherton*, 181 U. S., 155; *Bell* vs. *Bell*, *Id.* 175; *Streitwolf* vs. *Streitwolf*, *Id.* 179.

In *Bell* vs. *Bell*, *Streitwolf* vs. *Streitwolf* and *Andrews* vs. *Andrews* the question was expressly reserved whether jurisdiction to render a divorce having extra territorial effect could be acquired by a mere domicile in the state of the party plaintiff where there had been no matrimonial domicile in such state. (See 188 U. S., at page 40). That question is presented here with the additional circumstances that in decreeing a dissolution of the Illinois marriage between parties whose matrimonial domicile was in Illinois, for alleged causes occuring in Illinois, the California court disregarded and refused to give due faith and credit to an Illinois decree finding and adjudging in favor of Mrs. Harding upon the same alleged cause of action.

II.

A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, can not be again drawn into question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

Black on *Judg.*, Sec. 504.

It is unnecessary to enlarge on this point, but reference is made to the following authorities: *Stockton* vs. *Ford*, 18 How., 418; *Hopkins* vs. *Lee*, 6 Wheat., 109; *Smith* vs. *Kernochen*, 7 How., 198; *Young* vs. *Black*, 7 Cranch, 565; *Gaines* vs. *Miller*, 111 U. S., 395; *Eldred* vs. *Bank*, 17 Wall., 575; *Marine Ins. Co.* vs. *Young*, 1 Cranch, 332; *Thompson* vs. *Roberts*, 24 How., 233; *Goodrich* vs. *Chicago*, 5 Wall., 566.

The rule is aptly stated in different words by the Supreme Court of Massachusetts:

> "A cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, can not afterwards be litigated by a new proceeding either before the same or any other tribunal." *Foster* vs. *The Richard Busteed*, 100 Mass., 412.

A final decree in chancery is as conclusive as a judgment at law. *Shriver* vs. *Lynn*, 2 How., 43; *Washington Bridge Co.* vs *Stewart*, 3 How., 413; *Pennington* vs. *Gibson*, 16 How., 65; *Nations* vs. *Johnson*, 24 How., 195; *Bryan* vs. *Rennett*, 113 U. S., 179.

Discussion of these points is unnecessary. The only question can be. Was the issue in the California case

identical with that in the Illinois case? What has been said in the opening statement shows that the issues were identical; and they were treated as identical by the California courts (Trans., pp. 23-24, 108-9).

The allegations in the bill in the Illinois case on which that suit was based, was that on *February 1, 1890*, the complainant (Mrs. Harding) was living seperate and apart from her husband without her fault (Trans. p. 50). He answered denying this allegation of the bill and alleging that she was "living seperate and apart from him, without excuse therefor, and wholly of her own fault, and without the fault of defendant; and defendant upon learning of such *abandonment and desertion* by complainant, immediately sent repeated, and urgent invitations to complainant, to return to his house." (Trans. p. 67.) On that issue the case turned.

In his complaint in the California case he alleges "that on or about the *month of February, 1890*, the defendant disregarding the solemnity of her marriage vow, wilfully and without just cause deserted and abandoned the plaintiff, and ever since has been, and still continues so to wilfully and without just cause desert and abandon the said plaintiff, and *live separate and apart from him*, without any sufficient cause or reason, and against his will and without his consent."

In both the bill in the Illinois case and the complaint in the California case the allegations are that she was living separate and apart from her husband. In both cases the living separate and apart is that of February 1890. As already shown the identification is made, if it were possible, more complete by the fact that the same testimony used in the Illinois suit was stipulations used in the suit in California. (Trans., pp. 37-38-39-86-90.)

The question in each suit was whether the one separation and living separate and apart was by reason of her fault. The issues were absolutely identical. This was recognized by the California court and the case decided on that assumption. (Trans., pp. 23-24-108-110.) The Illinois court decided that such *status* was without fault of Mrs. Harding. The California court was bound by this decree, yet nevertheless proceeded to adjudicate the identical issue upon, in great part, the identical same evidence and entered an opposite judgment.

The fact that the two actions were different in form makes no difference as respects the faith and credit clause of the constitution.

III.

The California court was bound by the adjudication in the Illinois court, and, in disregarding the Illinois decree, the California court deprived plaintiff in error of a right under the Federal Constitution and statutes.

Sec, 1, Art. IV. of the Federal Constitution provides as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

The Federal statute provides:

> "And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." (*U. S. Rev. Stat.*, Sec. 905.)

The clause of the Federal Constitution and statute referred to applies to decrees of divorce.

Atherton vs. *Atherton*, 181 U. S., 155.

In *Mills* vs. *Duryee*, 7 Cranch, 481, since followed, and in *Renaud* vs. *Abbott*, 116 U. S., 277, this court construed these sections of the constitution and statute to mean that the court of a state must allow to a judgment of a sister state the same effect that it has in the state where rendered; and it was held in *Mills* vs. *Duryee* that this provision of the constitution changed the common-law effect of judgments of other states. (7 Cranch, 484). See also *Hilton* vs. *Guyot*, 159 U. S. 113, 181.

While this court on a writ of error to the supreme court of a state will not take judicial notice of the law of another state unless by the local law that court takes judicial notice of it; yet where the court whose decision is under review does take judicial notice of the law of another state, this court will assume that under the law and practice of the state it had a right so to do, and this court will do the same.

Renaud vs. *Abbott*, 116 U. S., 277.

Hanley vs. *Donoghue*, 116 U. S., 1.

The Supreme Court of California as appears from its opinion, assumed to take judical notice of the law of the State of Illinois, and attempted to expound the doctrine of the Illinois courts as to the effect to be given to the Illinois decree in question, and also as to the practice in the Illinois courts regarding certificates of evidence, thus, in effect, taking judicial notice of the laws of Illinois generally. This court will, therefore, take judicial notice of the law of Illinois and inquire whether the Supreme Court of California gave to the Illinois decree the force and effect which it has in Illinois.

It is contended that the Illinois decree was a consent decree; that the California court was bound to give it only the same effect given it in Illinois; and that in Illinois a consent decree is not *res adjudicata*, and the Supreme Court of California so held; but this view is erroneous in all respects.

In reply to this contention it is to be said that: (1) The Illinois decree was not a consent decree; (2) If it were it would have the same binding effect and conclude the parties to the same extent as it would had it been admittedly a decree in *invitum;* and (3) The courts of Illinois did not hold, and do not hold, that a consent decree is not an adjudication of the matters in issue and does not conclude the parties in respect to the matters decreed, but they hold the contrary.

While the opinion of the California court purported to give the Illinois decree the same effect which it has in Illinois, yet if that court erred in applying the rule, the jurisdiction here of the writ of error holds. *M'Elmoyle* vs. *Cohen*, 13 Pet., 312; *Chicago Etc. Ry.* vs. *Wiggins*, 108 U. S., 18; *Huntington* vs. *Attrill*, 146 U. S., 657.

(1.) *The decree is not a consent decree in the sense in which the term is used in the contention referred to.*

(*a.*) The so-called "stipulation" filed by Mr. Harding is not a stipulation as the term is ordinarily used in legal proceedings—that is an agreement entered into by the parties. It was an admission of record of a fact, and was treated only as such by Mrs Harding, and by the Circuit Court of Cook County.

After the evidence in the Illinois case of his *delictum*, was taken, the defendant in error, without notice to the complainant, filed in the case the paper in question on which is based the contention that the decree was entered by con-

sent, in which paper he states that he would consent to a decree against him, adding, in order that it might not be regarded as an agreement: "That this consent is not collusive is sufficiently shown by the length and character of the litigation. * * * To this end I declare my willingness to stipulate, and do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault" (Trans., p. 72). In other words he admitted the ultimate fact in issue in the case. The litigation in fact continued to be hotly carried on until October, 1899, when the Supreme Court of Illinois denied Harding's petition for a rehearing (180 Ill., 481).

The essential point in the so-called "stipulation" was the *admission of fact*, not the statement that the defendant *consented* to a decree. He apparently believed as the rule is, that the expressed consent would not justify a decree because he says, to the end that a decree may be rendered. "I do hereby stipulate," etc., the existence of the *fact* in issue.

(*b*) The decree itself, as already stated—and to the decree reference must be had to determine its character—discloses that the case came on to be heard, not on the *consent* of the defendant that a decree might be entered, but upon the bill, answer and replication, master's report and proofs and evidence (Trans., p. 81). Upon such hearing "the court having now considered and being duly advised in the premises, *doth find* that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant" (Trans., p. 16).

Thus the cause came on to be heard in the usual way and the court found from the evidence the essential fact. It matters not that this finding may have been based on the admission of the defendant; it was, nevertheless, an adverse finding. The recital in the certificate of evidence can not affect the decree. The decree speaks for itself, and nothing the court may say outside of the decree can change the effect of what the decree itself speaks.

Campbell vs. *Wilson*, 195 Ill., 284.

In that case the plaintiff in error filed a petition for an assignment of dower. She had previously joined with her husband in the execution of a deed which had been foreclosed in chancery and a sale made under a decree. She contended in that suit that for certain reasons given she had not released her dower estate. The decree of sale in that case recited that the master's report was approved and confirmed "except that portion thereof relating to dower estate of Charlotte C. Campbell, upon which claim for dower this court does not pass in this case." The property was sold and the report of sale was confirmed and the defendants did not redeem. The Supreme Court held that notwithstanding the recital referred to the court did pass upon the question of dower saying: "The court must have necessarilly passed on that question one way or the other, but by a most singular recital in the decree stated that the court did not pass on it."

If a recital in the decree itself that the court has not passed on a certain matter can not limit what is actually adjudicated, much less can a limitation be effected by a recital in a certificate of evidence outside the decree. But as previously shown the recital in the certificate of evidence did not purport to assert, and did not imply, that the decree was entered by consent, and the most that can be said of

the fact of the striking out the recital in the original draft of the decree the words "that the allegations of the bill are true," is that as several reasons were alleged in the bill why Mrs. Harding was without fault in living separate and apart from her husband, the court did not deem it necessary to find that *all* the allegations were true, but contented itself with finding the ultimate fact in complainant's favor, viz: that she was living separate and apart from her husband without her fault.

That it was not a consent decree is also apparent from the recital of the decree that defendant, Harding, objected and excepted to every finding and every portion thereof (Trans., p. 83), and was careful to have this again recited and certified in the certificate of evidence (*Id.*, 91). The California court erroneously ignored all this. It is further apparent from the opinion of the Supreme Court of Illinois (180 Ill., 481), to which this court, taking judicial notice of the law of Illinois, may refer. That court adopted almost wholly the opinion of the Appellate Court, to which the case was first appealed. It appears from the opinion (pp. 479-8) that George F. Harding assigned as error: "In decreeing that appellee was, at the time of the filing of the bill, living, and ever since had been living, separate and apart from appellant without her fault." Thus, obviously, he did not regard the decree as a consent decree, for a consent decree can not be appealed from. *Armstrong* vs. *Cooper*, 11 Ill., 540; *Knobloch* vs. *Mueller*, 123 Ill., 554; *R. R.* vs. *U. S.*, 113 U. S., 261.

Passing on this assignment of error the Supreme Court of Illinois said in its opinion (p. 503):

> "The statement or stipulation of appellant, signed by himself and his counsel, presented and read in open court and filed as it was, which states, among other

things, viz.: 'I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living, and ever since has been living, separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance,' amply justifes the finding of a decree of the court in so far as it relates to her living separate and apart from appellant without her fault."

So the Supreme Court of Illinois did not regard the decree as a consent decree, and in view of this and the previous considerations the contention that the decree was a consent decree is disposed of.

(2.) Even if the decree were a consent decree it would have the same binding effect as though it were a decree in *invitum*. *Knobloch* vs. *Mueller*, 123 Ill., 554, 565; *O'Connell* vs. *Chi. Ter. Ry.*, 184 Ill., 308, 325; *Laguerquist* vs. *Williams*, 74 Ill. App., 17, and other cases referred to below. Indeed, such a decree has an additional claim to be considered final. *Knobloch* vs. *Mueller, supra*. Perhaps a distinction should be made between a decree entered by consent of the defendant and without an agreement between the parties, and a decree entered by agreement of the parties and simply registering such agreement in the decree. Of the latter character it is claimed were the decisions in the two Illinois cases referred to in the opinion of the Supreme Court of California which will be referred to further on.

A decree entered upon an admission of fact, such as defendant in error made in the Illinois case, to-wit, that his wife was living separate and apart from him without her fault, is not a decree by agreement of the parties. If the defendant had filed no answer in the suit, but had made default, the bill would have been taken as confessed, that is

its allegations admitted to be true, and a decree entered upon such confession or admission. But would it be claimed that a decree so entered would not forever conclude the parties upon the matters properly pleaded and embraced in the decree?

In the case of a judgment at law upon a promissory note entered upon a *cognovit*, was it ever heard that such judgment did not conclude the parties to the same extent as though entered after a contest, or if in the course of a trial one of the parties waives proof of and formally admits a fact, is not a judgment in the case if rendered against him binding and conclusive everywhere?

If not, a party, who in the course of a trial made any admission of fact, could afterward, if the judgment were adverse, contend that the judgment was not conclusive, and all matters comprehended therein might be re-litigated, or a defendant believing in the course of a trial that a judgment against him was probable or inevitable, might announce that he would admit the truth of allegations against him, and if such judgment were not conclusive a plaintiff could never have his rights judicially determined if the defendant willed otherwise.

But a judgment rendered upon an admission of fact, or by consent, or by agreement of the parties, is binding and conclusive on the parties as to all issues involved, to the same extent as though rendered upon a contest. *Black on Judg.*, Sec. 705; *N. C. & St. L. Ry.* vs. *U. S.*, 113 U. S., 261; *Burgess* vs. *Seligman*, 107 U. S., 20; *Thomson* vs. *Wooster*, 114 U. S., 104; *Bank of Ga.* vs. *Higginbottom*, 9 Pet., 48; *U. S.* vs. *Parker*, 120 U. S., 89.

The rule applies also to judgments by default. *Harshman* vs. *Knox Co.*, 122 U. S., 306.

Also to judgment on demurrer. *Gould* vs. *R. R.*, 91 U. S., 526; *Bissel* v. *Spring Valley Twp.*, 124 U. S., 225.

In *N. C. & St. L. Ry.*, v. *U. S.*, this court said (p 266):

> "But the insurmountable difficulty is, that the former decree appears upon its face to have been rendered by a consent of the parties, and could not, therefore, be reversed, even on appeal. Courts of chancery generally hold that from a decree by consent, no appeal lies. Although that rule has not prevailed in this court under the terms of the acts of congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the case. *A fortiori*, neither party can deny its effect as a bar of a subsequent suit or any claim included in the decree."

In *Burgess* vs. *Seligman*, a suit had been brought against a corporation and a judgment entered by agreement as appeared by the recitals of the judgment with a stipulation that the defendant would be entitled to certain credits, if shown; afterward a suit was brought against the stockholders to collect this judgment and it was contended in that suit that the judgment against the corporation did not establish any debt due plaintiff. But this court held this contention was not sound, saying, (p. 26):

> "The judgment, as against the corporation and its privies, doth establish the debt named therein as due to the plaintiff, but subject to a defeasance for such an amount as might be shown to have been paid to subcontractors and laborers by the corporation. The defendants, as well as the corporation, were at liberty to show any credits, which, by the stipulation, were properly applicable in reduction of the amount of the

judgment. None such were shown, or attempted to be shown. Until such credits were shown the judgment stood valid for the whole amount."

In *Thomson* vs. *Wooster*, a bill having been filed the defendant failed to answer and a decree *pro confesso* was entered up against him. This court said, (p. 110):

> "The defendants are concluded by that decree, so far, at least, as it is supported by the allegations of the bill, taking the same to be true. Being carefully based on these allegations, and not extending beyond them, it can not now be questioned by the defendants unless it is shown to be erroneous by other statements contained in the bill itself. *A confession of facts properly pleaded dispenses, etc, with proof of those facts, and is as effective for the purposes of the suit as if the facts were proved;* and a decree *pro confesso* regards the statements of the bill as confessed."

In *Bank of Georgia* vs. *Higginbottom*, a guardian of certain minors, in order to secure them, confessed judgment in favor of two parties who had no knowledge of the proceedings at the time, but who afterward recognized the trust and accounted under it. Creditors attacked the judgment on the ground of fraud; but this court held the judgment valid in all particulars.

(3.) Such also is the law of the state of Illinois. *O'Connell* vs. *C. T. R. R.*, 184 Ill., 308; *Knoblock* vs. *Mueller*, 123 Ill., 554; *Lagerquist* vs. *Williams*, 74 Ill. App., 17.

In *O'Connell* vs. *C. T. R. R.*, a bill was filed by O'Connell against the railroad company and others to restrain them from building a road across his land. The defendants claimed a right and were attempting to act, under a village ordinance. It appears, however, that at a previous time the village had attempted to build a macadam road across

the land upon the same line, and in a suit brought by the then owner had been perpetually enjoined from so doing; and the court held that the railroad company and its co-defendants were privies with the village and bound by that decree, and said (p. 325):

> "It makes no difference whether the decree in the Martin case was a consent decree or not. Even if entered by consent of the village, it is binding upon those who are in privity with the village."

In *Knoblock* vs. *Mueller* there had been a partition suit by the heirs of a decedent, and by consent of the parties a decree was entered partitioning the land among them according to the laws of descent. Later one of the parties conveyed his interest to a purchaser upon a valid consideration. Still later a will of the decedent was found and probated which devised all of the land to one of the parties to the partition proceedings. He thereupon filed a bill to set aside, as a cloud upon his title, the aforesaid deed, but not asking to reopen the partition decree, or reverse, impeach or alter it, or to procure a rehearing upon the alleged newly discovered matter, but apparently relying upon the nullity or impeachable character of the decree; but the Supreme Court held that the court in which the partition proceedings were had, had jurisdiction of the subject-matter and of the parties and that the decree remained unreversed and in full force and effect and said (page 565):

> "Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent, in an amicable suit, has been held to have an additional claim to be considered final (*Allerson* vs. *Stark*, 9 A. & E., 225).
>
> "Decrees so entered by consent can not be reversed, set aside or impeached by bill of review, or bill in the

nature of a bill of review, except for fraud, unless it be shown that the consent was not, in fact, given or something was inserted as by consent that was not consented to (citing many cases). It is the general doctrine that such a decree is not reversible upon appeal or writ of error, or by bill of review, for error (*Armstrong* vs. *Cooper*, 11 Ill., 540). No exceptions were taken to the decree of partition, or attempt made in the cause in which it is referred to vacate or modify it."

The Supreme Court of California misconceived the Illinois decisions and rule.

The Supreme Court of California cited the cases of *Wadhams* vs. *Gay*, 73 Ill., 415, and *Farwell* vs. *Gt. West. Telegraph Co.*, 161 Ill., 522, as supporting the proposition that a consent decree is not *res judicata*, but misconceived the scope and meaning of those decisions. It construes those decisions as holding that a judgment or decree entered by agreement of the parties is not *res judicata* of the issues involved, while in fact those cases do not so hold but recognize the contrary doctrine.

The case of *Wadhams* vs. *Gay* was a bill filed to carry into effect a previous decree in partition which was incomplete in its provisions in not requiring the execution of deeds. The decree was therein impeached by defendants for fraud. The Supreme Court of Illinois held that upon such bill the court, upon the principle that upon a bill filed for the specific performance of a contract the court will not decree such performance if the contract is inequitable, would examine the decree so sought to be carried into effect, and if such decree was fraudulent or inequitable would refuse to carry it out. The decree sought to be carried out was one in partition. The parties to the decree claimed under a will; one Flagler was entitled under the

will to a certain portion of lands in fee. The parties agreed upon the respective interests and the agreement was reduced to writing, it being further agreed that as minors were interested a suit should be brought to effect the partition. The bill was filed by one of the parties and the copy of the statement of the respective interests agreed upon was attached to the bill, except that a portion of the statement in connection with the property set off to Flagler was "subject to the covenants, conditions, and reversion of the will," was omitted. After the agreement was made Flagler departed for his home in New York leaving the parties here to carry the agreement into execution by suit. The bill for partition, however, alleged that Flagler's interest was a life estate instead of an estate in fee, contrary to the agreement, and certain attorneys were requested by the parties conducting the suit to file an answer for Flagler, admitting the allegations of the bill, and consenting to a decree accordingly which gave Flagler but a life interest, which they did. Flagler was not advised of this fact until after the decree had been entered and the term of court passed. It was to enforce this decree by requiring the execution of deeds that the bill was filed in *Wadhams* vs. *Gay*. The court refused to enforce the decree on account of the injustice to Flagler, and the further ground that he *never in fact* consented to it. The court held (p. 426):

> "An attorney has no *implied authority* to compromise or give up any right of his client, *nor to consent to* a judgment against his clients."

And said further (p. 428):

> "We are entirely satisfied that this consent decree declares a wrong definition of the rights of Charles, on the mistaken supposition that he was consenting thereto, while, in fact, neither he nor his counsel in-

tended to assent to any such thing; but that he intended to have and retain all his rights under the will, and never consented or intended to give up any portion thereof to his children. Any such consent or intention is an imputed one to him, and not an actual one. * * *

"Arriving, as we do now, to the conclusion that, upon the evidence in this case, as matter of fact, this consent decree does not rest upon any basis of real right and equity, we come to the inquiry whether a court of equity should lend its aid in carrying it into execution, or give relief which would be tantamount to that."

The court then held that under the circumstances it was not bound to enforce the decree, citing authorities at length in support of its position. It was urged that the decree was *res adjudicata* but in regard to that the court said (p. 435):

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res adjudicata*, that where there is an incomplete decree and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection so as to render the decree effective, that then it is admissible to look at the real nature and character of the decree, as it may appear in the light of surrounding circumstances, for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose. Equity will penetrate beyond the covering of form, and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem."

The court incidentally reviews certain authorities upon the effect of a consent decree and it is upon these citations

that the Supreme Court of California bases its assertion that the Illinois court held in this case that a consent judgment is not *res adjudicata.*

It is apparent, however, from what has already been said that this discussion was *dictum* and not applicable to the case, as the court held that the decree in question was, in fact, not a consent decree, saying (page 436), in addition to what has already been quoted:

> "We are satisfied that these elements are not here present; that the supposed consent decree was made without any actual consent, and contrary to intention."

The only principle decided was that the court, upon a bill filed to enforce a decree, would not enforce that decree if it were fraudulent or inequitable.

The case of *Farwell* vs. *G. West. Telegraph Co.*, 161 Ill., 522, also cited by the Supreme Court of California to sustain the proposition that the Illinois courts did not give to a consent decree the effect of an adjudication, does not support that proposition, but holds only that equity has jurisdiction to grant relief against judgments and decrees obtained by fraud. In that case, a bill was filed by the stockholders of a corporation for certain relief, including the setting aside of a decree on a cross-bill, allowing a large claim in favor of one Reeve in a suit, already pending, involving the same matters, and to restrain proceedings in that suit against stockholders to enforce that and other fraudulent claims. A receiver had been appointed in the former suit, in which George F. Harding represented the corporation, being also a creditor thereof. The attorney for the receiver held by assignment, and otherwise, large claims against the corporation. A written agreement, which the court held to be a part of a conspiracy to defraud the corporation and its creditors, was

entered into by George F. Harding, the attorney for the receiver, and others, to secure the allowance and collection of certain claims by proceedings against the stockholders, and to appropriate the assets of the corporation. In pursuance of this agreement, by an arrangement between Harding, pretending to represent the corporation, and the attorney for the receiver, a decree was entered upon a cross-bill, filed by Reeve, finding a certain amount due to Reeve, and the property was sold under this decree and bought in by, or for, the parties held to be conspirators. It was contended that said decree was *res judicata*, as the stockholders were represented by the corporation which appeared by Harding, and by the receiver which appeared by its attorney; but the court held that instead of Harding and the receiver's attorney representing their respective clients they were really representing themselves and perpetrating a fraud upon the stockholders and creditors. The court said in its opinion (page 581):

> "The efforts made by this corporation to defeat Reeve's claim, and its effort to set aside the claims of Gage, Hilton and the bank, had been rendered nugatory by its own counsel, Harding, in conjunction with Sutherland, who had, from the inception of this litigation been constantly opposed to the corporation."

The court held that equity had jurisdiction to set aside judgments and decrees obtained by fraud, and cited *Johnson* vs. *Waters*, 111 U. S., 640, thus placing itself on the doctrine held by this court. The court then said (pp. 601-2):

> "The hearing on the Reeve cross-bill related to a matter that it had been agreed should not be contested between Sutherland and Harding—one representing Reeve, the other accepting notice as and for the corporation. Their agreement was to accomplish that

end. The confirmation of the master's report was by and in accordance with that previous agreement, and there was not a real controversy of a real interest by real parties on real evidence, but a proceeding to mislead master and judge alike, and induce what was not a real report or a real decree. It was such fraud that the decree of confirmation of the Reeve claim must be set aside and the report disapproved. It was, in effect, a finding by the master, and a decree, by consent, and they were so nearly the mere acts of the parties that it can not be said the facts or law were judicially ascertained."

So this case holds only the universal doctrine that a judgment or decree obtained by fraud can be set aside in equity by proper proceedings for that purpose. In the Illinois suit here in question not only was there here no contention that the decree was fraudulent or inequitable, but it was recognized as entitled to credit (Trans., pp. 23-24, 108-10), and Harding said to the court in the case at bar that he stood by his admission ("stipulation" he erroneously called it) made in the Illinois case (*Id.*, p. 95). The doctrine in Illinois is, as already shown by cases previously cited, the general doctrine obtaining in almost all of the courts, that a judgment or decree entered by consent is as binding and conclusive between the parties as one rendered in *invitum*.

It is not, however, necessary to resort to the rule that, under the circumstances, this court may take judicial notice of the laws of Illinois.

The law in California is that, in the absence of proof of the law of a sister state, the courts of California will presume that law to be the same as the law of California. *Shumway* vs. *Leskey*, 67 Cal., 458.

The presumption is even extended to the statute law of California and not limited to the common law.

Cavallaro vs. *Texas, etc., R. R.*, 110 Cal., 348.

Applying the law of California, a judgment by stipulation is conclusive as to all matters within the issues.

McCreery vs. *Fuller*, 63 Cal., 30.

Partridge vs. *Shepard*, 71 Cal., 470.

It follows from whichever course of reasoning is adopted that the question in issue in the suit in California had been adjudicated in the Circuit Court of Cook County, Illinois, whose decision had been affirmed by the Supreme Court of Illinois, and that the effect of such decree in Illinois was to make the adjudication everywhere and forever binding and conclusive upon the parties; that the Superior Court of San Diego County and the Supreme Court of California refused to give to the Illinois decree such faith and credit as it had by law and usage in the courts of the State of Illinois.

IV.

The State of California never was the matrimonial domicile of the parties and, therefore, the courts of California had no jurisdiction of their matrimonial status, and the decree of the California court was consequently for this reason also, erroneous.

The record shows that the parties were married in Illinois and lived there together until they separated early in February, 1890(Trans., pp. 26, 27, 39, 44, 45, 54). Harding does not claim to have made any change in his residence until May, 1895, and then lived with his sister in San Diego, California, who took care of the house for him, as he was without a wife in California (*Id.* 27). Harding lived in

Illinois while testimony was taken in the Illinois case (*Id.* 38; testimony of Beatrice).

There was no evidence showing, or tending to show, that California or any other state than Illinois, ever had been the domicile of Mrs. Harding or, in other words, that it had been the matrimonial domicile of the parties. The rule applies then that the fact that her residence, the status and the matrimonial domicile remained in Illinois is to be presumed (Cal. Civil Code of Proc., Sec. 1963, Par. 32).

While the court had jurisdiction of the parties, that, did not give the court jurisdiction of the subject-matter, that is the *status* of the parties. A suit for divorce is not merely a suit in *personam* but is also a proceeding *in rem.* The *status* of the parties is the *res.* In a proceeding *in rem* the jurisdiction of the court over the *res* must affirmatively appear. It appears from the record that the matrimonial *status* was created in the State of Illinois and under its laws and the *res* was thus created and established in that state. This *status* or *res* thus created there could not be removed to any other state without the act of both parties. It not appearing that this *status* had ever been removed to California and within the jurisdiction of its courts, it does not appear that the court had jurisdiction of the subject-matter of the suit. In a proceeding *in rem* the court will not presume that the *res* exists within the jurisdiction of the court, but it must be averred and proved that it lies within the jurisdiction, and upon the failure of such proof it will not appear, nor will it be presumed, that the court had jurisdiction of such subject-matter.

This court has not as yet directly passed upon this point, but in several cases it has specially reserved that question. *Bell* vs. *Bell*, 181 U. S., 175; *Streitwolf* vs. *Streitwolf*, 181 U. S., 179; *Andrews* vs. *Andrews*, 188 U. S., 14, 40.

The evidence in the case shows that it is not pretended or claimed that Mrs. Harding ever had a domicile, or ever resided in the State of California or, in other words, that California was ever the matrimonial domicile of the parties. That, on the contrary, the matrimonial domicile was never elsewhere than in the State of Illinois. It is, therefore, submitted that the courts of California had not, and never had jurisdiction of the *status*—the *res*—involved in a suit between these parties for divorce. The court will not be burdened with an argument upon this question, but it is submitted that the proposition stated involves the correct legal doctrine.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 222.

ADELAIDE M. HARDING, PLAINTIFF IN ERROR,

v.

GEORGE F. HARDING, DEFENDANT IN ERROR.

ERROR TO SUPREME COURT OF CALIFORNIA.

ADDITIONAL AUTHORITIES CITED BY PLAINTIFF IN ERROR.

As to the identity of the issues:

Miller v. Miller, 150 Mass., 111.

Plaintiff in error did not waive the benefit of the Illinois decree by introducing other evidence in the California suit.

See last paragraph in opinion in—

Donnell v. Wright, 147 Mo., 639.

See also:

Martin *v.* R. R., 103 N. Y., 626.

Barker *v.* R. R., 126 Mo., 143.

Other defenses than *res adjudicata* pleaded, but plea of *res adjudicata*, nevertheless, sustained.

Stockton v. Ford, 18 How., 418.

On jurisdiction:

Oxley Stair Co. *v.* Butler Co., 166 U. S., 657.
Bridge Prop'rs *v.* Hoboken Co., 1 Wall., 116.
Green Bay, &c., Co. *v.* Patten Paper Co., 172 U. S., 58.
Tex. & Pac. Ry. *v.* Sou. Pac. Co., 137 U. S., 48.

That the Illinois decree is final, see Black on Judgments, section 509, middle of section:

"Where a decree in equity passes upon the issues between the parties and finally determines their rights in respect to the main facts in controversy, or the principal object of the action, though it orders a reference as to specific items, or *reserves a right to apply for further relief*, or continues the cause for such further action as may prove to be necessary, it is conclusive as to the matters judicially and finally determined, although the reserved or postponed questions may still be open."

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